STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN McNEEL, individually, and WAKELIN McNEEL, as Trustee of the Kathleen McNeel Revocable Living Trust,

Plaintiffs-Appellees/Cross-Appellant,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
June 29, 2010

No. 285008
Mecosta Circuit Court
LC No. 04-16507-CK

Advance Sheets Version

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

K. F. KELLY, J. (*dissenting*).

I respectfully dissent. In my view, plaintiffs' claim is time-barred under MCL 500.2833(1)(q), and the trial court erred by denying defendant's motion for summary disposition. Further, the majority's conclusion that a question of fact exists regarding when the formal denial occurred is erroneous because (1) it fails to apply the plain language of MCL 500.2833(1)(q), (2) it applies the long-discredited judicial tolling doctrine, and (3) it implicitly applies the doctrine of equitable estoppel in the absence of facts supporting its application. I would reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiffs' property was destroyed by fire on March 18, 2003. Defendant's policy provided coverage to the property and its contents. Plaintiffs promptly notified defendant of the loss.

On April 17, 2003, by certified mail, defendant's senior claims representative, Kathy Macdonald, wrote to plaintiffs' adjuster, Stewart Shipper of Associated Adjusters, Inc., denying coverage for the claim, stating, in relevant part:

> Enclosed please find a copy of our Farm Bureau Mutual Farmowners Policy with regards to the above claim. Please note on page 10 #31 Increase in Hazard. Unless otherwise provided in writing, we will not be liable for loss occurring: b. while a described building, whether intended for occupancy by

> owner or tenant, is vacant beyond a period of sixty consecutive days or is unoccupied beyond a period of six consecutive months.
>
> In speaking with Maria McNeel and Wakelin McNeel both indicated that no one has actually resided in the dwelling for approximately 18 months. There was no furniture in the dwelling to constitute occupancy.
>
> *Due to the above we are denying coverage for this claim.* [Emphasis added.]

On May 12, 2003, Shipper wrote defendant, acknowledging receipt of defendant's denial of plaintiffs' claim on the basis of "Increase in Hazard" but contesting its conclusion that the property was unoccupied or vacant. In addition, Shipper submitted a list of personal property lost in the fire, as well as the cash value of the listed property. In conclusion, he requested defendant to "reconsider [its] denial[.]"

On May 22, 2003, Macdonald wrote to Shipper, stating: "In response to your letter of May 12, 2003 we are continuing our investigation into this matter. As soon as we have completed this investigation we will be in contact with you to discuss your client's claim further." Also on May 22, 2003, by certified mail, defendant rejected plaintiffs' "Sworn Statement in Proof of Loss"[1] and provided plaintiffs with an additional 15 days to resubmit the statement. Defendant also specifically notified plaintiffs that "[t]his is not a denial of your claim but rather a rejection of the Proof of Loss which was incorrectly completed." (Bold print omitted.)

After additional investigation, defendant wrote to Shipper on June 26, 2003, and denied plaintiffs' claim:

> After careful review of this matter along with additional investigation, we feel that we are justified in our denial of the above claim.
>
> It is [defendant's] position that the dwelling located at 10981 W. River Rd., Remus, MI was vacant and unoccupied at the time of the loss and for approximately 1 ½ years prior to this fire. This was substantiated to us by relatives of the named insured along with neighbor's [sic] of this dwelling.
>
> *Due to these facts we cannot honor the above claim.* [Emphasis added.]

The following day, Shipper requested further reconsideration of defendant's denial of plaintiffs' claim, continuing to contend that it was "wrongful." This request did not raise any factual dispute about the fire or its cause, but was based solely on the interpretation of the policy

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[1] Presumably, the "Sworn Statement in Proof of Loss" referred to Shipper's earlier submission of the list of personal property lost in the fire.

terms "vacant" and "unoccupied." Of particular note, Shipper's letter specifically recognized defendant's denial of the claim.

Three days later, on June 30, 2003, defendant reaffirmed its earlier denial of plaintiffs' claim:

> [Defendant has] also reviewed your documentation regarding the definition of vacant. . . . Our investigation indicates that the home did not sustain sufficient furnishings to maintain it as a residence.
>
> Based upon the definitions provided, our investigation, and the policy language under the increase in hazard, *we must again respectfully deny* the claim for fire damage to 10981 W. River Rd in Remus, Michigan of March 18, 2003. [Emphasis added.]

On July 21, 2003, Shipper once again acknowledged defendant's denial "based on an FC&S[2] reference" but requested information on how to locate the reference. On the same day, defendant responded to the request, stating:

> This letter is in response to [y]our correspondence of July 21, 2003. Your letter is incorrect in stating that we have denied the insured's claim based on a FC&S reference. *The claim was denied based on the facts of the loss and our investigation, as well as the applicable policy language.*

On September 24, 2003, Shipper again wrote defendant requesting further consideration. Notably, Shipper once again acknowledged and recognized that the claim had been denied, that defendant could continue to deny the claim, and that the time limit to initiate litigation was approaching:

> I have reviewed Farm Bureau's claim denial with the Insured.
>
> I am writing to ask for an appointment with you to discuss Farm Bureau's refusal to respond to the claim.
>
> The attorneys that I have spoken to state that the controlling issue will likely be a determination as to whether the house was abandoned.
>
> You may or may not decide to continue to deny the claim, but you should understand the reasons the Insured believes that the house was occupied.
>
> We can meet at your office or another agreeable location.

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[2] FC&S stands for "Fire, Casualty and Surety Bulletins."

> I would like to arrange the meeting as soon as possible because, *in the face of your denial, I must soon recommend an attorney for the further handling of this matter*. [Emphasis added.]

On October 14, 2003, defendant *again* wrote Shipper that it would continue to deny plaintiffs' claim.

Plaintiffs filed their complaint against defendant on October 5, 2004. In April 2005, defendant moved for summary disposition for failure to file within one year from the date of defendant's denial of the claim. Plaintiffs argued that no formal denial of the claim pursuant to MCL 500.2833(1)(q) had occurred before October 14, 2003, and that the complaint had therefore been timely filed. Plaintiffs further argued that defendant waived any right it had to rely on purported denials before that date because of defendant's inconsistent conduct.

The trial court denied the motion, concluding that there was a genuine issue of material fact regarding when the denial occurred.

II. STANDARDS OF REVIEW

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). We also review de novo a trial court's ruling on a motion for summary disposition. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 414; 745 NW2d 174 (2007). In reviewing a motion under MCR 2.116(C)(7), we must accept the plaintiff's well-pleaded allegations as true, and we must "look to the pleadings, affidavits, or other documentary evidence to see if there is a genuine issue of material fact." *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995). If no question of fact exists, whether the plaintiff's claim is barred by a statute of limitations is a question for the court. *Id*. at 377. "However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." *Id*. Further, this case also presents a question of statutory construction, which this Court reviews de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

III. SUMMARY DISPOSITION WAS IMPROPERLY DENIED

Defendant argues that the trial court erred by denying its motion for summary disposition. I agree. In my view, when the plain language of MCL 500.2833(1)(q) is applied to the facts of this case, the necessary conclusion is that plaintiffs' claim was untimely filed as a matter of law and the case should have been dismissed under MCR 2.116(C)(7).

A. THE MEANING OF MCL 500.2833(1)(q)

Because it is my view that the majority fails to apply the language of MCL 500.2833(1)(q), an explanation of its meaning is necessary to understand the rule that must be applied to the facts of this matter. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *USAA Ins Co v*

Houston Gen Ins Co, 220 Mich App 386, 389; 559 NW2d 98 (1996). Nothing will be read into a clear statute that is not within the manifest intent of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002), citing *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

MCL 500.2833(1)(q) provides:

> (1) Each fire insurance policy issued or delivered in this state shall contain the following provisions:
>
> * * *
>
> (q) That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. *The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability*. [Emphasis added.]

In other words, it is the rule in Michigan, under the clear language of this provision, that fire insurance policies provide a "mandatory limitation period [for filing a lawsuit] of at least one year, with tolling, unless a longer period is specifically set forth in the insurance policy." *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 106-107; 580 NW2d 903 (1998). Consistently with common sense, the statute makes the centerpiece for determining when the limitations period begins to run the point at which an insurer has formally denied liability. It is not surprising that the receipt of a formal denial will "unequivocally impress[] upon the insured that the extraordinary step of pursuing relief in court must be taken," *Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93, 101; 393 NW2d 167 (1986), and the statute, accordingly, embodies this concept.

Because the focus of the present dispute is when the insurer formally denied liability, the relevant phrase of the statute for purposes of this litigation is "until the insurer formally denies liability." "Until" means "[u]p to the time of" and "[b]efore a specified time."[3] *The American Heritage Dictionary, New College Edition* (1976). Black's Law Dictionary (5th ed) defines "until" as follows: "Up to time of. A word of limitation, used ordinarily to restrict that which precedes to what immediately follows it, and its office is *to fix some point of time* or some event upon the arrival or occurrence of which what precedes will cease to exist." (Emphasis added; citation omitted.) Thus, under the statute, the one-year period is tolled "'from the date of a specific claim for benefits to the date of a formal denial of liability.'" *Hudick v Hastings Mut Ins Co*, 247 Mich App 602, 607; 637 NW2d 521 (2001), quoting *Lewis*, 426 Mich at 101.

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[3] While it should go without saying what the meaning of the word "until" is, I offer the dictionary definition of the word here. This Court may consult a dictionary to discern a word's common meaning. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

Our appellate courts have already parsed the meaning of the term "formal denial." "A denial of liability need not be in writing to be formal, but it must be explicit." *Mt Carmel Mercy Hosp v Allstate Ins Co*, 194 Mich App 580, 587; 487 NW2d 849 (1992) (citation omitted). Although the best formal notice is a writing, notice may be sufficiently direct to qualify as formal without being put into writing. *Mousa v State Auto Ins Cos*, 185 Mich App 293, 295; 460 NW2d 310 (1990). Accordingly, under this state's jurisprudence, a "formal denial" must be explicit and direct.

B. PLAINTIFFS' CLAIM IS TIME-BARRED

Here, it is undisputed that the loss occurred on March 18, 2003. It is undisputed that defendant received the proof of loss on March 19, 2003. And, as the majority agrees, it cannot be disputed that defendant formally denied liability on June 26, 2003.[4] On that date, defendant informed plaintiffs in a letter that "we are justified in our denial of [your] claim" and "we cannot honor [your] claim." At that point, pursuant to the clear and unambiguous terms of MCL 500.2833(1)(q), the one-year limitations period for bringing suit was no longer tolled and the limitations period began to run.

Yet despite this formal denial, plaintiffs continually attempted to have defendant reopen their case rather than filing suit. Defendant, however, continued to refer back to its previous formal denial. In its written statements, defendant made the following explicit reassertions of its denial:

June 30, 2003: "[W]e must *again* respectfully deny the claim . . . ."

July 21, 2003: "The claim *was denied* based on the facts . . . ."

Oct 14, 2003: "[W]e . . . *continue to deny* your client's claim." (Emphasis added.)

Importantly, after each reiteration of defendant's decision to deny plaintiffs' claim, Shipper specifically and unequivocally *acknowledged* that defendant had earlier denied the claim. He repeatedly recognized the June 26, 2003, denial as early as June 27, 2003, and as late as September 24, 2003, and even wrote to defendant: "[I]n the face of your denial, I must soon recommend an attorney for the further handling of this matter." Clearly, plaintiffs knew at this point that "the extraordinary step of pursuing relief in court must be taken." *Lewis*, 426 Mich at 101.

Thus, it is undisputed on the record that plaintiffs failed to file suit within one year of defendant's June 26, 2003, formal denial of liability. Consequently, their claim is time-barred, and summary disposition should have been granted in defendant's favor. The trial court had before it all the written documentation affecting the instant claim and, thus, the question presented was merely a question of law. "[W]here written documents are unambiguous and

[4] In his affidavit filed in the trial court, Shipper also admits that on "June 26, 2003 . . . Farm Bureau denied the claim."

unequivocal, their construction is for the Court to decide *as a matter of law*." *Mt Carmel*, 194 Mich App at 588 (emphasis added);[5] see also *Huron Tool*, 209 Mich App at 377. And, as these documents plainly and obviously showed, plaintiffs' complaint, filed more than a year after the formal denial, was untimely filed under the statute. The trial court erred by failing to properly apply the plain language of MCL 500.2833(1)(q) in the present matter. Summary disposition in defendant's favor should have been granted.

C. SHIPPER'S AFFADAVIT DOES NOT CREATE A QUESTION OF FACT

The majority, however, contends that a question of fact exists about when defendant formally denied plaintiffs' claim because further discussions ensued between the parties regarding the claim after the June 26, 2003, denial letter. The majority relies on the affidavit of Shipper, who attested that defendant's agent allegedly agreed to meet with him in September 2003 and "indicated he would consider the claim in light of the requested documents . . . and would only make a decision as to whether or not the claim would be denied after he had done so." At the outset, assuming without conceding that the affidavit is even relevant, it must be noted that the statements of the claim adjuster are unsubstantiated in the record, are internally inconsistent, are merely self-serving allegations, and are even contradicted by Shipper's own contemporaneous writings to defendant. There simply is no substantiating evidence in the record that defendant indicated in September 2003 that it formally rescinded its denial[6] and would only deny the claim after it had reviewed certain requested documents other than plaintiffs' claim

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[5] In *Mt Carmel*, this Court held that the following letter from the defendant insurance company constituted a formal denial of defendant Naima Nafso's claim for personal injury protection (PIP) benefits:

> "Pursuant to our recent phone conversation, Mr. Amer Nafso and Akram P. Najor live at 19214 Bauman; Detroit, MI 48203; and are insured with State Farm, policy No. 532736261422.
>
> "Therefore, a PIP claim for Naima Nafso must be filed with that company.
>
> "We are in receipt of Mr. Nafso's application for benefits. We must know if, if [sic] anyone is taking Mr. Nafso's place in his store; and is the store suffering a loss due to Mr. Nafso's injuries?
>
> "Please forward a copy of Mr. Nafso's policy with Continental Life Insurance Company." [*Mount Carmel*, 194 Mich App at 587 (emphasis omitted).]
>
> This Court held that the "language of denial in the letter was unambiguous" and that the letter constituted a formal denial "*as a matter of law*." *Id.* at 588 (emphasis added).

[6] As set forth in part I of this opinion, defendant first formally denied plaintiffs' claim on April 17, 2003, but expressly and completely rescinded that denial in writing on May 22, 2003. The difference between the first formal denial of liability on April 17 and the denial of liability on June 26, 2003, is that defendant never directly and unequivocally withdrew or rescinded the June 26 denial.

adjuster's unsubstantiated statements. Such bald allegations, which are arguably also inadmissible hearsay, without other support in the record, are insufficient to create a genuine issue of material fact. See *Town v Mich Bell Tel Co*, 455 Mich 688, 712 n 10; 568 NW2d 64 (1997) (RILEY, J., concurring); MCR 2.116(G)(4). Rather, the affidavit merely reflected a desire on Shipper's part to persuade defendant to settle the matter without a lawsuit. In hindsight, this desire turned out to be wishful thinking, and plaintiffs simply failed to assert their rights in a timely manner as required by MCL 500.2833(1)(q). While plaintiffs may very well have a cause of action against Shipper or their attorneys, or both, for failing to file the instant matter within the limitations period, the failure to file certainly cannot be attributed to defendant.

Further, even if the affidavit created a factual dispute in regard to the parties' correspondence, which it does not, it would nonetheless be irrelevant given that defendant formally denied plaintiffs' claim in June 2003 and defendant never made any direct, explicit formal rescission of that denial. The clear and unambiguous language of MCL 500.2833(1)(q) directs that the limitations period be tolled "until the insurer formally denies liability." Shipper's ongoing attempts to settle the case without litigation were immaterial and should not be a consideration under the plain language of MCL 500.2833(1)(q). As previously noted, that provision plainly states, in relevant part: "An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss *until* the insurer formally denies liability." MCL 500.2833(1)(q) (emphasis added). Absolutely nothing in the plain language of this provision permits a court to create a question of fact out of one party's subsequent attempts to settle if it is clear on the record that a formal denial had been made; the express language of the statute makes no exception for such behaviors or conduct. Nothing in the provision provides for any type of further tolling after the formal denial. Thus, the parties' further discussions and plaintiffs' continual unilateral submissions of additional information and requests to reconsider the denial did not operate, and could not have operated, to rescind defendant's formal denial of liability. The majority's conclusion that a question of fact exists regarding when the formal denial occurred based on events that happened after the formal denial, *which it admits occurred* on June 26, 2003, ignores the statute's plain and unambiguous language in order to avoid the statute's effect.

IV. THE MAJORITY WRONGLY INVOKES JUDICIAL TOLLING

In support of its position that a question of fact is presented, the majority invokes the doctrine of judicial tolling, thereby enabling litigants to evade the limitations period of MCL 500.2833(1)(q).[7] Litigants may now easily avoid the consequences of a statutorily mandated

[7] Ironically, even under the majority's interpretation of MCL 500.2833(1)(q), plaintiffs' claim would still be barred. For example, the limitations period began to run on June 26, 2003, when defendant formally denied the claim, as the majority concedes. Even assuming that the October 10, 2003, meeting resulted in a further tolling of the one-year time limitation, 106 days had already passed during which the period was not tolled. If the period again began to run on October 14, 2003, there only remained 259 days in which to file suit. Thus, even under the

limitations period. Litigants can simply create "questions of fact" by continually initiating further discussions and submitting the same or additional documentation regarding the claim to insurers even after the claim is formally denied. Our Supreme Court has explicitly rejected these sorts of judicially created tolling mechanisms that are contrary to the plain language of a statute or contract. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005); *McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008). In doing so, the Court noted, "Statutory . . . language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." *Devillers*, 473 Mich at 582. To do so is to "legislate[] from the bench" and to act outside the constitutional authority vested in the courts of this state. *Id.* However, despite the Legislature's clear directive and obvious intent that a claimant must bring his or her claim within one year of a formal denial, the majority's contrary decision amends the statute, eviscerates the Legislature's intent, and fails to honor preexisting law.

V. THE MAJORITY IMPLICITLY APPLIES EQUITABLE ESTOPPEL

Finally, although it is unclear from the majority's analysis, it appears that it may also be invoking the doctrine of equitable estoppel to justify its desire to toll the limitations period. By doing so, the majority is simply interpreting plaintiffs' actions after the June 26, 2003, denial letter in a way that alleviates the *effect* of the formal denial of liability. "[E]quitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). "Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position." *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998). It requires proof of "conduct clearly designed to induce 'the plaintiff to refrain from bringing action within the period fixed by statute.'" *Lothian v Detroit*, 414 Mich 160, 177; 324 NW2d 9 (1982), quoting *Renackowsky v Detroit Bd of Water Comm'rs*, 122 Mich 613, 616; 81 NW 581 (1900). To invoke the doctrine, the plaintiff must establish three elements: "(1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party." *Cincinnati Ins Co*, 454 Mich at 270. Thus, in the context of insurance claims, the plaintiff must show that the defendant concealed a cause of action, misrepresented the time in which an action must be brought, or induced the plaintiff to refrain from bringing an action. *Compton v Mich Millers Mut Ins Co*, 150 Mich App 454, 458; 389 NW2d 111 (1986). None of these necessary elements are present here and, thus, the doctrine of estoppel is inapplicable.

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majority's reasoning, plaintiffs would still have had to file by June 25, 2004—259 days from October 14, 2003, in order to be timely. Plaintiffs, however, ultimately filed suit in October 2004.

VI. CONCLUSION

To conclude, there is and was no question of material fact that defendant formally denied plaintiffs' claim on June 26, 2003. There is and was no question that defendant did not intend to pay on plaintiffs' claim. Under the plain and unambiguous language of MCL 500.2833(1)(q), an insured must bring his or her claim within one year after the insurer formally denies liability. The trial court erred by denying defendant's motion for summary disposition when there was no dispute on the record that plaintiffs' claim had been formally denied in June 2003 and plaintiffs had not filed their complaint until well after June 2004. The majority's decision compounds this error by reinvigorating the doctrine of judicial tolling that our Supreme Court has explicitly rejected and that will now only serve to invite uncertainty for future litigants.

For these reasons, I dissent and would reverse the judgment of the trial court.

/s/ Kirsten Frank Kelly